(2)

No. 03-9560

Supreme Court, U.S.
FILED
AUG 9 - 2004
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

---

MARLON HOWELL,
*Petitioner,*

v.

STATE OF MISSISSIPPI,
*Respondent.*

---

**On Writ of Certiorari to the Supreme Court of Mississippi**

---

## BRIEF FOR MARLON HOWELL, PETITIONER

---

ANDRÉ de GRUY *
510 George Street, Suite 300
Jackson, MS 39202
(601) 576-2316

DUNCAN LOTT
P.O. Box 382
Booneville, MS 38829
(662) 728-9733

* Counsel of Record

*Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

1. Can a state court, consistent with the Eighth and Fourteenth Amendments to the Constitution of the United States, refuse to instruct a jury in a death penalty case on at least one lesser included offense that is recognized in state law and supported by the evidence?

2. Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF THE ARGUMENT | 6 |
| ARGUMENT | 7 |
| I. IN AFFIRMING THE TRIAL COURT'S DENIAL OF A REQUESTED LESSER INCLUDED OFFENSE INSTRUCTION THE MISSISSIPPI SUPREME COURT IGNORED TWENTY-FIVE YEARS OF CASELAW FROM THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ITS OWN DECISIONS, RESULTING IN A VIOLATION OF MARLON HOWELL'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS | 7 |
| II. MARLON HOWELL PROPERLY RAISED HIS FEDERAL CONSTITUTIONAL CLAIMS IN THE MISSISSIPPI SUPREME COURT PURSUANT TO THAT COURT'S RULES OF PRACTICE AND PROCEDURE | 13 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| *Baldwin v. Reese*, U.S. , 124 S.Ct. 1347 (2004) | 16 |
| *Beck v. Alabama*, 447 U.S. 625 (1980) | *passim* |
| *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982) | 11 |
| *Colbum v. State*, 431 So. 2d 1111 (Miss. 1983) | 14 |
| *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988) | 10 |
| *Daugharty v. Gladen*, 257 F.2d 750 (9th Cir. 1958) | 17, 18 |
| *Duncan v. Henry*, 513 U.S. 364 (1995) | 18 |
| *Duplantis v. State*, 708 So. 2d 1327 (1998) | 15 |
| *Eddings v. Oklahoma*, 455 U.S. 104 (1982) | 17 |
| *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984) | *passim* |
| *Harper v. State*, 478 So. 2d 1017 (Miss. 1985) | 3 |
| *Haverston v. State*, 493 So. 2d 365 (Miss. 1986) | 13 |
| *Hill v. State*, 432 So. 2d 427 (Miss. 1983) | 15 |
| *Hopper v. Evans*, 456 U.S. 605 (1982) | 13, 15 |
| *Howell v. State*, 860 So. 2d 704 (Miss. 2003) | 1, 2, 7 |
| *In Re Jordan*, 390 So. 2d 584 (Miss. 1980) | 15 |
| *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976) | 13, 15 |
| *Jackson v. State*, 732 So. 2d 187 (Miss. 1999) | 17 |
| *Johnson v. State*, 416 So. 2d 383 (Miss. 1982) | 14 |
| *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984) | 11 |
| *Kemp v. Pate*, 359 F.2d 749 (7th Cir..1966) | 17 |
| *Kirby v. Warden*, 296 F.2d 151 (4th Cir.1961) | 18 |
| *Knowles v. State*, 410 So. 2d 380 (Miss. 1982) | 15 |
| *Lanier v. State*, 450 So. 2d 69 (Miss. 1984) | 15 |
| *Lee v. State*, 469 So. 2d 1225 (Miss. 1985) | 8 |
| *Martinez v. California*, 444 U.S. 277 (1980) | 16 |
| *Picard v. Connor*, 404. U. S. 270 (1971) | 17 |
| *Randall v. State*, 716 So. 2d 584 (Miss. 1998) | 13 |
| *Ruffin v. State*, 444 So. 2d 839 (Miss. 1984) | 15 |
| *Sanders v. United States*, 373 U.S. 1 (1963) | 17 |
| *Schad v. Arizona*, 501 U.S. 624 (1991) | 10 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Spaziano v. Florida*, 468 U.S. 447 (1984) | 10 |
| *Spencer v. State*, 348 So. 2d 1030 (Miss. 1977) | 15 |
| *Taylor v. Illinois*, 484 U.S. 400 (1988) | 16 |
| *Watts v. State*, 717 So. 2d 314 (Miss. 1998) | 11, 12 |
| *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988) | 12 |


STATUTES & ADMINISTRATIVE CODES


| | |
|---|---|
| 28 U.S.C. § 1257 | i |
| 28 U.S.C. § 2254 | 16 |
| Miss. Code Ann. § 97-3-19(1)(c) | 9 |
| Miss. Code Ann. § 99-17-20 | 13 |

IN THE

# Supreme Court of the United States

---

No. 03-9560

---

MARLON HOWELL,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

---

**On Writ of Certiorari to the Supreme Court of Mississippi**

---

## BRIEF FOR MARLON HOWELL, PETITIONER

---

## OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at *Howell v. State*, 860 So.2d 704 (Miss. 2003).

## JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 23, 2003, and rehearing denied on December 18, 2003. The petition for a writ of certiorari was filed on March 17, 2004, and granted on June 28, 2004. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.

§ 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: The Eighth Amendment to the Constitution of the United States, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States which provides, in pertinent part, that:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Marlon Howell was indicted for capital murder, defined as a killing during the commission of an attempted robbery, by a Union County, Mississippi, Grand Jury. *Howell*, 860 So.2d 704. He was tried and convicted of capital murder and sentenced to death by a Union County jury. During the course of the trial Howell presented alternative defenses. He offered the absolute defense of alibi but also vigorously fought the alleged underlying felony of attempted robbery. If the jury concluded that the evidence of attempted robbery was not established beyond a reasonable doubt, it could not find Howell guilty of capital murder. *Id.* at 742-43, ¶ 136.

The state's case for robbery was undermined by two of its own witnesses. First, a co-defendant-turned-state's-witness testified that the shooting was done by Howell but it resulted from Mr. Pernell first spraying Howell in the face with mace. *Id.* at 714, ¶ 11. Further, the shooting was observed by a



disinterested witness, Charles Rice. Mr. Rice testified that he observed a conversation and that there were no indications of a robbery taking place. *Id.* at 713, 743, ¶¶ 3, 136.

Rice testified that he was in his Broad Street home on the morning of May 15, 2000, when he heard a horn blowing outside and looked out the window. (T. 548) The window he looked through was approximately 20-25 feet from the road. (T. 549) He saw two vehicles that were two to three feet apart. A man got out of the passenger's side of the rear vehicle and walked between the two cars up to the driver's side of the front one. (T. 550)

The person who approached Pernell's car was having some type of conversation with him. (T. 554) Mr. Rice observed the subject bent over looking into the vehicle, talking to the driver. (T. 581) The subject then jerked his hands up in the air, pulling away from the vehicle, and then brought his hands down, pulled out a pistol and shot Pernell. (T. 554) Rice was clear that when the individual got out of the car and later raised up and threw his hands in the air, he did not have a gun in his hand or gloves on. (T. 581)

After the shooting, the suspect jumped back, the rear vehicle backed up into the road and the subject got into the passenger's side front seat and the vehicle took off. (T. 555) Rice testified he did not see anything occur between the time the shooter got out of the car and the shooting took place to indicate to him that a robbery was being committed; nor did he see anything occur afterwards that suggested a robbery. (T. 601) In his 911 call, Rice indicated he saw a shooting, not a robbery. (T. 602)

Brandon Shaw testified that on the evening of May 14 he and his girlfriend Keisha went over to Oliver Jones' house and stayed until 10:00 or 10:30 p.m. (T. 629) Adam Ray and Curtis Lipsey were at Jones' house but later all went to Shaw's house. (T. 630) Shaw, Ray and Lipsey left to ride

around where they saw Marlon Howell and picked him up. (T. 630-631) They switched to Adam Ray's grandmother's car (T. 633) and went to the Chevron station near the Highway Patrol office at around 11:30 p.m. for gas. (T. 634) Shaw stated when Howell got into the car with them he explained he needed money to pay his probation officer. (T. 634)

The four of them drove to Tupelo. After driving around town they went by a gas station and saw a man out front. Marlon Howell made a statement "there goes an easy lick." (T. 638) Shaw testified they stopped in Tupelo to get gas (T. 639) and then went back to New Albany. (T. 639) After they got back to New Albany, they went to Shaw's house and sat around for a few hours and talked. (T. 640) Shaw testified that while in New Albany, Marlon Howell never said anything about robbing anybody; nor after Howell, Ray and Lipsey returned from Tupelo did he ever mention robbing anyone. (T. 679)

Curtis Lipsey testified he was with Marlon Howell when Howell shot Pernell on the morning of May 15, 2000. (T. 704) Lipsey testified that on the evening of May 14th he was with Bernard Shaw and Adam Ray when they picked up Marlon Howell who indicated he needed money to pay his probation officer. (T. 705) Lipsey indicated he, Ray, Shaw and Howell went to Tupelo. While in Tupelo they drove by a convenience store and saw a man standing outside on the phone. Howell asked Shaw to stop his car and made a statement that the man at the pay phone would be a "good little lick." (T. 707-708)

Lipsey testified that after they returned to New Albany, a car drove by and Howell reached over and blinked the car lights on and off trying to stop the car. Adam Ray got back in the car and they pulled behind the car and it stopped. Howell got out, went to the man's car, jumped back, pulled a gun out and shot the man. (T. 708-709)



Lipsey testified that when Howell came back to the car after the shooting, Howell stated he shot the man because he had sprayed him in the face with mace. (T. 713) Lipsey testified Howell did not have a gun in his hand when he got out of the car and went to Pernell's car. (T. 734)

Marcus Powell testified that he knew Curtis Lipsey, Adam Ray, Brandon Shaw and Marlon Howell. (T. 750) On May 14, 2000, about 8:00 p.m. he went to Brandon Shaw's house in New Albany. (T. 751) Adam Ray, Brandon Shaw, Marlon Howell and Curtis Lipsey were also at Shaw's house. (T. 752) Powell testified Marlon Howell told him he needed to pay his probation officer or he was going to be locked up. (T. 753) Powell stated Shaw, Howell, Ray, and Lipsey left Shaw's home around 11:00 p.m. (T. 754)

Powell testified that before they left, Marlon Howell stated he was going to make a sting. (T. 755) Powell explained that saying to "sting" someone could mean to borrow money or get money from someone who owed you, and that Howell never said he was going to rob anyone. (T. 772)

The evidence is undisputed that the person who approached Pernell's car did not have a gun drawn; nor during his brief conversation with Pernell did he draw a gun. (T. 581, 734) It was not until the assailant jumped back from Pernell's car and raised his hands in the air that he then pulled a gun and fired. (T. 554-55, 708-09) Lipsey testified that when Howell came back to the vehicle occupied by Ray and Lipsey, Howell indicated that Pernell had sprayed him with mace and so he shot Pernell. (T. 713)

Based on these facts, Howell sought a jury instruction on "simple" murder and manslaughter. [J.A. 17-20] The trial court denied these instructions. Howell raised this issue on appeal to the state supreme court but was denied relief. *Id.* at 741-44.

## SUMMARY OF THE ARGUMENT

The death sentence in this cause is plainly unconstitutional in that the jury was given only two options—guilt of capital murder or acquittal. Howell properly requested a lesser offense instruction supported by the facts of this case and permitted under state law. The State of Mississippi objected and the trial court denied the tendered instruction.

Howell adequately preserved his claim of entitlement to such an instruction as a matter of federal constitutional law as well as Mississippi law. The state supreme court's established rule for reviewing allegations of improper denial of lesser offense instructions in death penalty cases explicitly incorporates the federal constitutional rights recognized by this Court in *Beck v. Alabama*.

It is commonly understood among the bench and bar in Mississippi that state law and the federal constitution occupy the same ground in considering lesser offense instructions in death penalty cases. Where, as here, the federal constitutional right and the state law right occupy the same ground, the state court's rejection of the claim on one basis implicitly rejects the claim on both.



## ARGUMENT

### I. IN AFFIRMING THE TRIAL COURT'S DENIAL OF A REQUESTED LESSER INCLUDED OFFENSE INSTRUCTION THE MISSISSIPPI SUPREME COURT IGNORED TWENTY-FIVE YEARS OF CASELAW FROM THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ITS OWN DECISIONS, RESULTING IN A VIOLATION OF MARLON HOWELL'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Marlon Howell requested his jury be instructed on the lesser included offenses of murder and manslaughter. *Howell v. State*, 860 So.2d at 741-44, ¶ 131-40. The trial court refused those instructions and his case was submitted to the jury with two options—guilty of capital murder or not guilty of any offense. *Id.* Howell argued in the trial court and on appeal to the Mississippi Supreme Court that he was vigorously fighting the evidence of robbery—the underlying felony elevating the case from murder to capital murder and thus subjecting him to the possibility of a death sentence. *Id.* at ¶ 136.

The trial testimony supported Howell's request. Charles Rice, called by the State of Mississippi, testified that the person who approached Pernell's car was having some type of conversation with Pernell. (T. 554) The subject then jerked his hands up in the air, pulling away from the vehicle, and only then brought his hands down, pulled out a pistol and shot Pernell. (T. 554)

Rice was clear that when the individual got out of the car and later raised up and threw his hands in the air, he did not have a gun in his hand or gloves on. (T. 581) Rice stated he did not see anything occur between the time the shooter got out of the car and the shooting took place to indicate to him

that a robbery was being committed; nor did he see anything occur afterwards suggestive of a robbery. (T. 601)

Curtis Lipsey testified he was with Marlon Howell on the date Howell shot Pernell. (T. 704) Lipsey testified that when Howell came back to the car after the shooting, Howell stated that he shot the man after the man had sprayed him in the face with mace. (T. 713) Lipsey testified that Howell did not have a gun in his hand when he got out of the car and went to Pernell's car. (T. 734)

Marcus Powell testified that before Lipsey, Ray and Howell left Shaw's house, Marlon Howell stated he was going to make a sting. (T. 755) Powell testified that saying to "sting" someone could mean to borrow money or get money from someone who owed you, and that Howell never intimated that he was going to rob anyone. (T. 772)

The proof is undisputed that the person who approached Pernell's car did not have a gun drawn; nor during his brief conversation with Pernell did he draw a gun. (T. 581, 734) It was not until the assailant jumped back from Pernell's car and raised his hands in the air, that he then pulled a gun and fired. (T. 554-55, 708-09) Lipsey testified that when Howell came back to the vehicle occupied by Ray and Lipsey, Howell indicated that he shot Pernell because he had sprayed him with mace. (T. 713)

When this evidence is taken in "the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence," it cannot be said "that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge)." *See Harper v. State*, 478 So.2d 1017 (Miss. 1985); *Lee v. State*, 469 So.2d 1225 (Miss. 1985) (determining whether lesser included offense instruction should be granted, defendant must be given benefit of all



doubts about evidence); *see also Fairchild v. State*, 459 So.2d 793 (Miss. 1984).

The state supreme court recognized that Howell's argument, based on the facts of this case, was that:

> The jury could have found and returned the lesser-included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached Pernell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter.[1] The [c]ourt's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell loose or convict him of [c]apital murder . . . .

Nonetheless, the court held Howell was not entitled to a lesser included offense instruction. *Howell* at ¶ 139. In holding that Howell was not entitled to a lesser-included offense instruction of murder or manslaughter, the state court ignored the mandate of this Court and affirmed a plainly unconstitutional death sentence. *See Beck v. Alabama*, 447 U.S. 625 (1980).

Where as here the evidence in a capital murder trial could support a verdict of guilt of a non-capital offense, the defendant is entitled under the Eighth and Fourteenth Amendments to the Constitution of the United States to submit to the jury an instruction on the non-capital offense. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). If the jury is not given that option, the resulting capital murder conviction upon which the death sentence rests is unreliable and the

---

[1] More appropriately, a reasonable juror could have returned a verdict of guilty of murder pursuant to Miss. Code § 97-3-19 (1)(c). Under this fact scenario Howell would have been guilty of killing during the commission of a felony, i.e., attempt to sell drugs.

decision of guilt beyond a reasonable doubt uncertain. *Beck* at 642-43.

This Court's "fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." *Schad v. Arizona*, 501 U.S. 624, 646 (1991).

The Court previously acknowledged that "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free." *Spaziano v. Florida*, 468 U.S. 447 455 (1984). As the *Beck* Court noted, such a risk of unwarranted conviction cannot be tolerated in a case in which the defendant's life is at stake. *Beck*, 447 U.S. at 637.

The goal of *Beck* was to "eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Schad*, 501 U.S. at 646. The *Beck* Court recognized that the issue of lesser included offenses has a direct impact on the reliability of the guilt determination in capital cases. *Schad*, 501 U.S. at 646.

The Fifth Circuit has held that *Beck* is violated where the trial judge erroneously fails to give a lesser offense instruction. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988), *cert. denied*, 108 S. Ct. 2832 (1988). Under the Eighth Amendment to the Constitution of the United States, "a lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser included offense and acquit him of the greater." *Id.* at 767. "*Beck* stands for the proposition that 'the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" *Cordova*, 838 F.2d at 767.



The question then becomes, as a matter of state law is "murder" a lesser-included offense of "capital murder." The Mississippi Supreme Court definitively answered that question in *Watts v. State*, 717 So.2d 314 (Miss. 1998). In *Watts* the State of Mississippi argued and the trial court held that "simple murder is a lesser included offense of capital murder." *Watts* at ¶ 11. In evaluating this claim the state supreme court held:

> ¶ 12. In support of his argument, Watts cites to two Fifth Circuit Court of Appeals' cases, *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984), 475 U.S. 1003, 106 S.Ct. 1172, 89 L.Ed.2d 292 (1986) and *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), for the theory that "'[i]n Mississippi, no murder committed during the course of a robbery can be a simple murder.'" *Jones v. Thigpen*, 741 F.2d 805, 816 (5th Cir. 1984) (quoting *Bell v. Watkins*, 692 F.2d 999, 1004-05 (5th Cir. 1982)), *vacated on other grounds*, 475 U.S. 1003 (1986). Both *Jones* and *Bell* involved situations in which the trial court refused to give a lesser offense instruction where the defendant was charged with capital murder while engaged in the commission of robbery. *Jones*, 741 F.2d at 815-16; *Bell*, 692 F.2d at 1004-05. In *Jones*, the Fifth Circuit held that the trial court did not commit error by refusing to give a lesser included offense instruction of simple murder where no lesser included offense was provided by state law for murder committed during the commission of a robbery. *Jones*, 741 F.2d at 816. In *Bell*, the Fifth Circuit, stating that under Mississippi law "no murder committed during the course of a robbery can be simple murder," similarly held that the trial court's refusal to give a lesser included offense instruction was proper where there was no evidence to support the lesser charge. *Bell*, 692 F.2d at 1005.
>
> ¶ 13.This Court, however, in *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984), held that this theory was flawed

because it presupposed that the defendant was guilty of robbery. *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984). The *Fairchild* Court stated:

> The theory is flawed. It determines what instruction will be granted at the request of the capital murder defendant on the basis of a presumption that he has already been found guilty of the underlying felony. The theory forgets that there is no such thing as a directed verdict of guilty in a criminal case, either on the principal charge in general or on any of its components. Its logic requires the determination that the proof offered by the State where not substantially contradicted must perforce be believed by the jury and so acted upon in their verdict. True, the evidence that Fairchild participated in a robbery in this case is substantial. What the trial judge has done, however—following the theory advanced by the Fifth Circuit—has been to find as a matter of law that Fairchild is guilty of robbery *before the case is ever submitted to the jury*. This constitutionally he has no authority to do.

*Fairchild*, 459 So.2d at 800. Based on this logic, this Court held that it was error, although not reversible error because Fairchild received the same sentence that he would have received for a conviction of simple murder, for the trial court to refuse to grant a lesser included offense instruction on simple murder. *Id.* at 801. Thus, Watts' reliance on *Jones* and *Bell* is unfounded where this Court has held that a simple murder instruction may be given on a charge of capital murder. In addition, this Court has stated that "[b]y its form, [Miss. Code Ann. § 97-3-19] implicitly recognizes the established doctrine that simple murder is a lesser included offense of capital murder." *Wheeler v. State*, 536 So.2d 1341, 1344 (Miss. 1988).

*Watts* at 319 (emphasis original).



Without question, as a matter of state law, murder is a lesser included offense of capital murder.[2] Accordingly, the denial of the requested lesser-included offense instruction for which Mr. Howell could have been found guilty as a matter of state law violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

## II. MARLON HOWELL PROPERLY RAISED HIS FEDERAL CONSTITUTIONAL CLAIM IN THE MISSISSIPPI SUPREME COURT PURSUANT TO THAT COURT'S RULES OF PRACTICE AND PROCEDURE.

Petitioner adequately presented his federal constitutional claim to the Mississippi Supreme Court. There are two distinct bases for this conclusion. First, the Mississippi Rule on considering lesser offense instructions in death penalty cases has an intrinsic federal constitutional basis. In *Fairchild v. State*, 459 So.2d 793, 800 (Miss. 1984), the Mississippi Supreme Court held that

> [w]here the state seeks imposition of the penalty of death, the rule [of granting lesser offense instructions] takes on constitutional proportions. *Beck v. Alabama*, 447 U.S. 625, 632-33, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392, 400 (1980); *Hopper v. Evans*, 456 U.S. 605, 611-12,102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982); *Jackson v. State*, 337 So.2d 1242, 1254-1255 (Miss. 1976).

On appeal to the Mississippi Supreme Court, Howell relied primarily on *Haverston v. State*, 493 So.2d 365, 374-75 (Miss. 1986). [J.A. 39] The State of Mississippi in response relied primarily on *Randall v. State*, 716 So.2d 584, 591 (Miss. 1998). [Brief of Appellee at 76]. Each of these cases

---

[2] *See also* Miss. Code § 99-17-20 providing in death eligible cases for instruction on *any* non-death eligible offense.

derives its authority from *Fairchild*. Thus both Howell and the State of Mississippi were operating on the notion that the rule they were seeking to have applied was based on the federal constitutional due process clause as interpreted by *Beck v. Alabama*.

Howell submitted proposed jury instructions on two lesser offense charges. [J.A. 17-20] At the instruction conference Howell argued extensively the evidentiary basis for the instructions and sought the instructions explicitly to avoid placing the jury in the untenable position of convicting him of capital murder or cutting him loose, [J.A. 33, 40], this argument being this Court's primary rationale supporting *Beck v. Alabama*. The trial court denied those instructions on evidentiary grounds. [J.A. 33]

Thus Howell presented himself to the Supreme Court of Mississippi in the identical position as Roger Fairchild. The Mississippi Supreme Court in addressing Fairchild's claim, stated:

> Fairchild finally charges that the trial judge committed error when he refused to charge the jury regarding two lesser-included offenses, murder and manslaughter.
>
> The record reflects that Fairchild's attorneys requested Instruction No. D-24 which would have submitted the lesser-included offense of murder and Instruction No. D-25 which would have submitted the lesser-included offense of manslaughter. Each of these instructions was refused by the trial judge on the grounds that there was not a sufficient evidentiary basis in the record for granting either.
>
> Our law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such. *Colburn v. State*, 431 So.2d 1111, 1114 (Miss.1983); *Johnson v. State*, 416 So.2d 383, 388 (Miss.1982). Where under the evidence a reasonable jury could find the defendant not guilty of the principal



> charge made in the indictment but guilty of a lesser included offense, the trial judge ordinarily should instruct the jury regarding the elements of that lesser-included offense. *Knowles v. State*, 410 So.2d 380, 382 (Miss.1982). *Ruffin v. State*, 444 So.2d 839, 840 (Miss.1984), expressly declares that, only where the evidence could *only* justify a conviction of the principal charge should a lesser included offense instruction be refused.
>
> This rule is wholly applicable in prosecutions brought under this state's capital murder statute. *Lanier v. State*, 450 So.2d 69, 79-81 (Miss.1984); *see also, Hill v. State*, 432 So.2d 427, 440-441 (Miss.1983); *Johnson v. State*, 416 So.2d 383, 387-388 (Miss.1982); *In Re Jordan*, 390 So.2d 584, 585-86 (Miss.1980); *Spencer v. State*, 348 So.2d 1030, 1030 (Miss.1977). Where the state seeks imposition of the penalty of death, the rule takes on constitutional proportions. *Beck v. Alabama*, 447 U.S. 625, 632-33, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392, 400 (1980); *Hopper v. Evans*, 456 U.S. 605, 611-12, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982); *Jackson v. State*, 337 So.2d 1242, 1254-1255 (Miss.1976).

*Fairchild*, 459 So.2d at 799-800. (emphasis added).

Clearly, Howell properly presented his claim to the trial court under Mississippi law. *Duplantis v. State*, 708 So.2d 1327, 1339-40 (1998) (tendering instruction sufficient to preserve error in denial of same because "[t]his in and of itself affords counsel opposite fair notice of the party's position and the Court an opportunity to pass upon the matter"); *Fairchild*, 459 So.2d at 800.

Second, this Court's decisions support petitioner's position. In *Beck v. Alabama*, 447 U.S. 625, 630-31 n. 6 (1980), the case on which Howell's constitutional claim rests, the defendant had clearly presented the claim regarding the granting of a lesser offense jury instruction to the lower state courts but did not develop the issue in his final brief on the

merits to the Alabama Supreme Court. The state supreme court affirmed the conviction stating that the defendant had raised only one claim which related to state law. This Court accepted jurisdiction of this "plainly unconstitutional" imposition of the death penalty.[3]

Last term this Court "granted certiorari to determine whether the Ninth Circuit [had] correctly interpreted the 'fair presentation' requirement" in a case brought under 28 U.S.C. § 2254. *Baldwin v. Reese*, __U.S.__, 124 S.Ct. 1347, 1350 (2004). This Court concluded that the Ninth Circuit was wrong when it held the petitioner had met the "fair presentation" standard where the Oregon Supreme Court would have or should have realized Reese's claim rested upon federal law by reading the opinion of the lower state trial court. *Id.*

This Court flatly rejected imposing a requirement that state courts read their own lower court opinions. This Court was concerned with altering the ordinary review practices of state courts and the "serious burden" such an "opinion-reading" requirement would impose on state appellate courts. *Id.* at 1350-51.

The case *sub judice* is readily distinguishable. The Mississippi Supreme Court was not required to read beyond a brief to find material that fairly presents the federal claim.

---

[3] *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ( "A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts .nake it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction."); *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980) (state court ruling did not expressly mention the federal constitution but it was clear from trial proceedings that defendants were relying on federal constitution).



The rule sought to be applied in this matter is a rule announced by the Supreme Court of Mississippi itself, not an opinion of a lower trial court. *See Fairchild*, 459 So.2d 793. Thus the concerns expressed in *Baldwin v. Reese* are not applicable to this case. Moreover, when reviewing death penalty cases on direct appeal as in this case, the Mississippi Supreme Court does not exercise discretionary review but rather plenary review. *See Jackson v. State*, 732 So.2d 187, 189 (Miss. 1999).

Where as here the state-law rule and the federal constitutional rule are commonly understood to coexist and to be "virtually identical" in terms, the rejection of a claim under the state-law rule is tantamount to rejecting it under the federal rule. This Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982); *see also Daugharty v. Gladen*, 257 F.2d 750, 758 (9th Cir. 1958) (where defendant in a state criminal proceeding contends that his confession was coerced or that perjured testimony had been knowingly used, it would be unnecessary to cite to the state court "book and verse on the federal constitution").

Similarly in *Picard v. Connor*, 404 U.S. 270, 275 (1971), this Court addressed the question of "whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction." *Id.* at 277. The *Picard* Court went on to say:

> Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (7th Cir. 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. *See Sanders v. United*

> *States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). Hence, we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958); *see Kirby v. Warden*, 296 F.2d 151 (4th Cir. 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

*Id.* at 277 - 278.

In *Duncan v. Henry*, 513 U.S. 364, 366 (1995), this Court suggested that if the standards prescribed by a state-law rule and a federal constitutional rule are "virtually identical," the federal claim may be preserved by invoking the state-law rule. That is to say that, at least where a rule is generally understood to have a grounding in both federal constitutional law and parallel state law–like the rule excluding involuntary confessions, or the rule precluding trial of a defendant while mentally incompetent, or the rule requiring the submission of lesser offenses in a capital case under *Beck*–and where the state standard and the federal constitutional standard are virtually identical, a reference to the rule that describes its elements in terms of those common standards suffices to preserve the federal claim even if the federal constitution is not expressly cited. Under *Fairchild* the state-law rule and the federal constitutional rule are commonly understood to coexist and to be "virtually identical" in terms; thus, the rejection of a claim under the state-law rule is tantamount to rejecting it under the federal rule.

The Mississippi Supreme Court rule applied to consideration of lesser offense instructions in death penalty cases is based on the Fourteenth Amendment to the Constitution of the United States. *Fairchild*, 459 So.2d at 800. Thus anytime the rule is invoked that court understands that the claim before it includes the federal constitutional claim and both the



State of Mississippi and capital defendants operate under the notion that the claim is premised on both state law and the federal constitution. Accordingly, Marlon Howell properly raised his federal constitutional claim concerning the proper application of *Beck v. Alabama* to the Mississippi Supreme Court and that court had an adequate opportunity to address the claim.

## CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court must be reversed.

Respectfully submitted,

ANDRÉ de GRUY *
510 George Street, Suite 300
Jackson, MS 39202
(601) 576-2316

DUNCAN LOTT
P.O. Box 382
Booneville, MS 38829
(662) 728-9733

* Counsel of Record

*Counsel for Petitioner*